U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

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Date: **June 1, 2000**

Case No.: **2000-INA-81**
CO No.: **P95-CA-29361**

In the Matter of:

Priscilla S. Bustamante
Employer,

on behalf of:

Lenila Lazatin
Alien.

Appearances: Jack Golan
For Employer and Alien

Certifying Officer: Paul R. Nelson
San Francisco, California

Before: Burke, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arises from an application for labor certification pursuant to Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act") and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor denied the application, and Employer requested review pursuant to 20 C.F.R. § 656.26. This decision is based on the record upon which the CO denied certification and Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c).

Under section 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook. In the original application ("ETA 750A"), Employer sought certification to employ Lenila Lazatin ("Alien") to fill the position of Domestic Cook with the following duties:

> Plan menus, cook, bake and serve meals in private home for family members and guest. He/she will: obtain information regarding guest list and their dietary requirements; plan and prepare list, order and receive food items, such as produce, meat, poultry, fish, seafood and dairy products; prepare and decorate desserts and bake breads and pastries; prepare aesthetically pleasing appetizers, salads, soups, entrees, and cook season, boil, broil, saute, steam, baste, stir and carve meats, poultry, fish and vegetables; set formal table and serve meals & refreshments; maintain kitchen and storage areas clean & orderly; wash dishes, pots, pans & utensils; clean oven, refrigerator & freezer; do seasonal cooking by preserving and canning fruits, jams and vegetables. (AF 22)

Additionally, the job requires two years of experience as a Domestic Cook. (AF 27).

Employer, Priscilla Bustamante, filed an application for alien labor certification on July, 13, 1994 for the position of Domestic Cook, as previously mentioned herein. (AF 50). The position was advertised in the Los Angeles Times for three consecutive days, and Employer received three responses. Employer found that all three applicants responding to the ad failed to meet the minimum requirements for the position because they all lacked experience as a Domestic Cook. (AF 26). In a letter dated July 13, 1994, Employer stated that she attempted to find a U.S. worker to fill the position, but was unable to locate a "willing, able or qualified applicant for the position of Domestic Cook." (AF 26).

On June 27, 1995, the CO issued a Notice of Findings ("NOF") stating the Department's intention to deny the application for alien labor certification. (AF 18-20). The CO concluded that Employer failed to demonstrate that the job duties constituted full-time employment in the context of Employer's household. The NOF indicated that Employer must provide additional evidence in order to establish that the position of Domestic Cook meets the definition of "employment" as provided by the

regulations. 20 C.F.R. 656.3. The NOF then listed specific additional data required in order to establish that the position constitutes full-time employment. (AF 19). The CO directed Employer to state the number meals to be prepared on a daily and weekly basis, the number of people to be served, and the time required to prepare the meals. He also required information be provided concerning the details of Employers entertaining practices, child care provisions, and other job duties the Alien would be required to perform in addition to cooking. (AF 19-20).

Employer submitted her Rebuttal on July 31, 1995, in which she detailed the number of meals required to be prepared for the family members on a daily and weekly basis. (AF 11-14). Employer provided information concerning her entertainment practices during the prior year, including the number of occasions she had entertained and the number of guests present at each occasion. (AF 12-13). Employer indicated that the Alien would not be expected to perform non-cooking related duties, and Employer provided work schedules for her and her husband, along with her daughters school schedule. She then listed the current provisions made for her daughter's care when the parents are absent and the provision which would be made when the child would be home with the worker. (AF 13).

On January 19, 1996, the CO issued a Final Determination denying certification. (AF 2-3). The CO stated that Employer's Rebuttal documentation was considered, but that Employer failed to rebut the finding provided in the NOF. In order to qualify as full-time employment, the work of Domestic Cook must be in the range of 35-40 hours per week. The CO concluded that Employer did not document that the job-duties in the present case constituted full-time employment. Additionally, the CO found that Employer had reasonable alternatives to performing cooking and cooking related duties. (AF 3).

Employer filed a request for review of the denial of certification on February 2, 1996. (AF 4-5). Subsequently, the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review.

DISCUSSION

Section 656.20(c)(8) of the Department's labor certification regulations requires that the employer offer a *bona fide* job opportunity. Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *See Modular Container Systems, Inc.*, 1989-INA-228 (July 16, 1991) (*en banc*), *cited in*, *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). In *Carlos Uy*, the Board held that a Section 656.20(c)(2) bona fide job opportunity analysis is appropriate when the CO has reason to believes that the job opportunity was mis-characterized as a skilled Domestic Cook instead of some sort of unskilled domestic service position or that Employer was attempting to create a job in order to assist an alien to immigrate to the United States. *Daisy Schimoler* , 1997-INA-218 (Mar. 3, 1999) (*en banc*), *citing Carlos Uy III*, 1997-INA-304.

In the present case, the CO did not address Section 656.20 (c)(8) in his Denial, but instead based his rejection of the certification on the assertion that the evidence provided by Employer failed to meet the definition of "employment" provided by Section 656.3. (AF 3). Specifically, he found that Employer did not establish that the duties of the job constituted full time employment for the position of domestic cook. *Id.* However, this Board has previously stated "that the definition of employment in section 656.3 cannot be used to attack the employer's need for a position by questioning the hours in which a worker will actually be engaged in work-related duties." *Schimoler*, 1997-INA-218. Instead, the proper inquiry was held to be whether there was a *bona fide* job opportunity utilizing the section 656.20 (c)(8) analysis. This Board felt it unreasonable that an employer would be forced to present a nearly eight hour day work schedule for the worker as their only means of rebuttal. In *Schimoler*, we preferred to examine the facts presented to determine if the work day provided by the opportunity would be consistent with the customary work day of a full time employee in the same industry. If so, we found section 656.3 to be an improper ground for denying the application for certification.

However, the question of whether employer is offering a *bona fide* job opportunity might be the relevant inquiry if an employer cannot provide sufficient duties that would constitute gainful employment for a substantial part of the week. *Id.* Furthermore, it has been established that "citation of section 656.3 to question the nature of the position also gives employer inadequate notice of what is really being questioned by the CO." *Id.* Similar to the situation in *Schimoler*, several of the questions presented in the NOF indicate that the CO suspected employer was attempting to mis-classify the position. These inquires involved questions pertaining to the provisions for child care made by employer at times when the child would be home alone with the worker. The NOF also asked employer to state whether the worker would be performing any non-cooking related duties. Finally, the mention by the CO in his Final Determination of alternatives available to employer further suggests that the CO was suspicious of whether Employer had presented a *bona fide* job opportunity pursuant to the regulations. If the CO suspected mis-classification, the proper analysis is under section 656.20(c)(8), and the employer should have notice of "precisely why the application does not appear to state a *bona fide* job opportunity." *Carlos Uy*, supra at 7. The NOF should provide adequate notice of the regulatory violations found in order to provide Employer with administrative due process. Such notice was not clearly stated in the present case.

Accordingly, this matter will be remanded for issuance of a supplemental NOF for reevaluation of the application consistent with the discussion herein.

ORDER

IT IS ORDERED that this matter is hereby **REMANDED** to the Certifying Officer..

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.